88-2000

No. _____



In The

Supreme Court of the United States

October Term, 1988

STEVE COWPER, GOVERNOR OF ALASKA, et al.,

Petitioners,

v.

THE SECRETARY OF THE INTERIOR and THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Section 19 of the Outer Continental Shelf Lands Act was enacted to give the governor of an affected coastal state a leading role in decisions relating to oil and gas lease sales on the outer continental shelf. It requires the Secretary of the Interior to accept the recommendations of the Governor of Alaska about the size, timing, or location of a proposed outer continental shelf oil and gas lease sale off the coast of Alaska if those recommendations provide a reasonable balance between the national interest and the well being of the citizens of Alaska. In 1985 the Governor of Alaska recommended that the Secretary of the Interior delay Sale 92 (Bristol Bay) and delete sensitive near shore tracts from the sale. Although those recommendations were entitled to substantial deference, the Secretary rejected both recommendations.

The questions presented are:

(1) Did the Secretary give the Governor's recommendations the deference to which they were entitled; and

(2) Was the Secretary's decision to reject the recommendations arbitrary and capricious?

LIST OF PARTIES

Petitioners:

Steve Cowper, Governor of Alaska
Alaska Independent Fishermen's Marketing Association
Aleutians East Coastal Resource Service Area
Bering Sea Fishermen's Association
Bristol Bay Borough
Bristol Bay Coastal Resource Service Area
Cenaliulriit
United Fishermen of Alaska
Trustees for Alaska
Natural Resources Defense Council, Inc.
Eskimo Walrus Commission
Northern Alaska Environmental Center
City of Quinhagak
Nunam Kitlutsisti
Alaska Center for the Environment
Village of False Pass
Sierra Club
The Wilderness Society
Environmental Policy Institute
National Audubon Society
Defenders of Wildlife

Respondents:

The Secretary of the Interior
The United States Department of the Interior
AMOCO Production Company
ARCO Alaska, Inc.
Exxon Corporation
Mobil Exploration & Producing Services, Inc.
Murphy Oil Company
Shell Western E & P Inc.
Sohio Alaska Petroleum Company
Union Oil Company of California
International Association of Geophysical Contractors

Plaintiffs/Appellants in the Proceedings below:

The Tribal Village of Akutan
The Tribal Village of Togiak
The Tribal Village of Nelson Lagoon

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THE SECRETARY OF THE INTERIOR and THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On behalf of the people of the State of Alaska, Steve Cowper, Governor of Alaska, et al. respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 869 F.2d 1185 (Appendix A, App. A-1). The January 22, 1988 Judgment and Memorandum and Order of the United States District

Court for the District of Alaska is unpublished (Appendix B, App. B-1). The March 11, 1988 Judgment and Memorandum and Order of the United States District Court for the District of Alaska is unpublished. (Appendix C, App. C-1).

JURISDICTION

On October 5, 1988, the Ninth Circuit issued an opinion affirming the decisions of the United States District Court for the District of Alaska. The State of Alaska filed a petition for rehearing and on March 9, 1989, the Ninth Circuit issued an order and an amended opinion denying the petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

43 U.S.C. § 1345 states:

> (a) Recommendations regarding size, time, or location of proposed lease sales
>
> Any Governor of any affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan. Prior to submitting recommendations to the Secretary, the executive of any affected local government in any affected State must forward his recommendations to the Governor of such State.

(b) Time for submission of recommendations

Such recommendations shall be submitted within sixty days after notice of such proposed lease sale or after receipt of such development and production plan.

(c) Acceptance or rejection of recommendations

The Secretary shall accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. For purposes of this subsection, a determination of the national interest shall be based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies of this subchapter. The Secretary shall communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations, or to implement any alternative means identified in consultation with the Governor to provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.

(d) Finality of acceptance or rejection of recommendations

The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale or a proposed development and production plan in any suit or judicial review pursuant to section 1349 of this title, unless found to be arbitrary or capricious.

(e) Cooperative agreements

The Secretary is authorized to enter into cooperative agreements with affected States for purposes which are consistent with this subchapter and other applicable Federal law. Such agreements may include, but need not be limited to, the sharing of information (in accordance with the provisions of section 1352 of this title), the joint utilization of available expertise, the facilitating of permitting procedures, joint planning and review, and the formation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws, regulations, and stipulations relevant to outer Continental Shelf operations both onshore and offshore.

STATEMENT OF THE CASE[1]

A. Introduction

This case concerns the proper balance between the role of state and federal governments in the decision-making process leading to outer continential shelf (OCS) oil and gas leasing, development and production that puts at risk the greatest concentration of birds, fish, and marine mammals on the North American continent. The locus of the case is Alaska's Bristol Bay and the associated North Aleutian Basin of the OCS, an area of unparalleled biological productivity.

The significance of the issues presented in this case was emphasized by the recent grounding of the Exxon Valdez in Prince William Sound, resulting in the largest

[1] Except for the references to the Exxon Valdez oil spill, the information in this Petition is a part of the record on appeal in the Ninth Circuit.

oil spill in American history and dramatically demonstrating the devastating impact of oil on biological resources. The Prince William Sound (the Sound) oil spill occurred less than thirty miles from port, where there is easy access to the area, when weather conditions were favorable, and where the Sound is protected from the open ocean by numerous islands. In spite of those factors and oil industry assurances to the contrary, efforts to clean up the spill have been largely unsuccessful, and the spill continues to wreak ecological havoc both in the Sound and elsewhere in Alaska more than two months later.

Bristol Bay and the North Aleutian Basin are substantially more remote and inaccessible than the Sound, the weather is much more problematic, and there are no islands to provide protection from the full fury of the North Pacific; efforts to clean up an oil spill in this area accordingly would be even less successful than in the Sound. However, despite the Alaska Governor's recommendation that leasing of the area be deferred at least until more experience is gained in oil and gas development on the OCS in the harsh environment off Alaska's shores, and in the face of his own staff's determination that at least one or more major spills of at least 1,000 barrels of crude oil would be likely to occur if the area was leased, the Secretary of the Interior (Secretary) offered Bristol Bay for lease in the federal government's OCS Sale 92.

The precise questions presented here are (1) whether the Secretary gave the Governor's recommendations the deference to which they were entitled, and (2) whether the Secretary's decision to offer the area for lease was

arbitrary and capricious. The broader issue, however, is that a proper balance was not struck between satisfying the nation's thirst for oil and gas and protecting of one of the most biologically productive and important areas in the world.

B. Bristol Bay

Bristol Bay and the North Aleutian Basin lie off the southwestern coast of Alaska, north of the Alaska Peninsula. They possess the greatest concentration of birds, fish, and marine mammals found anywhere in the North American continent. According to the Department of the Interior (Interior), "the fisheries of the North Aleutian Basin are among the most productive in the world." The National Marine Fisheries Service (NMFS), which has responsibility for the conservation of marine mammals, the protection and management of fishery resources, and the fostering of commercial fisheries for the benefit of the nation, has concluded that the Bristol Bay area is the *single most important region* of the United States OCS for these resources.

This area also encompasses one of the world's great bird migration crossroads. The nutrient-rich lagoons and bays on the north side of the Alaska Peninsula (adjacent to Bristol Bay) support, in various seasons, major portions of the North American and Pacific flyway populations of several species of waterfowl, including black brant, emperor goose, and Steller's eider.

At least 27 species of marine mammals are found in the area. Virtually the entire eastern population of endangered Pacific gray whales, estimated at 15,000 to 17,000,

and approximately 871,000 northern fur seals migrate through Unimak Pass and through the Sale 92 area during the spring and fail.

C. Hazards to the Area from Oil and Gas Leasing

Activities that would be undertaken pursuant to Sale 92 are a significant threat to the incredibly valuable resources of Bristol Bay. Interior concluded that at least one major spill of 1,000 or more barrels of oil is likely to occur as a result of Sale 92.[2] Interior also admitted that Sale 92 can be expected to result in major or moderate effects to the red king crab population and commercial fishery, to marine and coastal birds, and to fur seals and sea otters.

NMFS, in its biological opinion issued pursuant to the Endangered Species Act (ESA), concluded that a major oil spill from Sale 92 when right whales are present or during the peak of the gray whale migration is likely to jeopardize the continued existence of these endangered species. NMFS also concluded that open water geophysical seismic surveys would likely jeopardize the continued existence of gray and right whales under certain conditions.

D. Administrative and Judicial Process

On April 29, 1983 Interior issued a Call for Nominations and Comments for Sale 92. On July 21, 1983, Interior

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[2] The Prince William Sound oil spill experience makes this prediction look conservative at best, especially since tanker traffic is a part of the transportation scenario for Sale 92.

identified an area for this lease sale of some 32.5 million acres. The Secretary later reduced the sale area by about 83 percent, to 5.6 million acres, by removing areas of low hydrocarbon potential.

In January 1985, the Secretary released a draft environmental impact statement (DEIS) for Sale 92. The State of Alaska filed detailed comments calling for a delay in the sale, at least until 1994, so that information and research gaps regarding the impacts of oil spills could be filled. The Environmental Protection Agency (EPA) noted a variety of deficiencies in the DEIS, most notably with the Oil Spill Risk Analysis (Risk Analysis). EPA felt the Risk Analysis had the effect of seriously understating the risks and overstating the benefits of oil and gas development in Bristol Bay. The National Oceanic and Atmospheric Administration (NOAA) also was critical of the DEIS, identifying major information gaps and criticizing the adequacy of the assessment of impacts. NOAA attacked the Risk Analysis, a critical part of the assessment of impacts.

Notwithstanding these objections, the Secretary issued the final environmental impact statement (FEIS) and Proposed Notice of Sale in September 1985. The FEIS considered four alternatives for Sale 92.[3] At that time the Secretary also issued an Environmental Assessment which examined the environmental impacts of lower (by 23 percent) estimates of hydrocarbon resources. Neither

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[3] Alternative I (the sale as it occurred); Alternative II (no sale); Alternative III (delay of the sale); Alternative IV (deferral of tracts close to the Alaska Peninsula).

the FEIS nor the Risk Analysis was modified in any material way to account for the deficiencies identified in the agency or public comments. Despite calls for a delay in the sale, the Proposed Notice of Sale included the entire 5.6 million acres analyzed in the FEIS. The Secretary did not defer any tracts from the sale.

Neither the DEIS nor the FEIS contained any discussion of a key assumption regarding Alternative IV, one of the crucial alternatives to the proposed sale. This alternative would have deleted from the sale area all nearshore tracts within 25 miles of the Alaska coast, an alternative that was favored by the State of Alaska, NMFS, and others. The key assumption concerned the amount of oil underlying the nearshore tracts for purposes of the Risk Analysis. The FEIS assumed that only a small portion of the area's oil resources were located in these nearshore tracts, thereby creating the appearance that environmental benefits from the deletion of these tracts would be minimal. This assumption rested on a mathematical error that skewed the comparison of alternatives, leading the Secretary to seriously underestimate the environmental benefits of Alternative IV when making his leasing decision for Sale 92.

In November 1985 the Governor of Alaska[4] submitted his recommendations to the Secretary pursuant to Section 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345. The Governor requested a

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[4] In 1985 that Governor was Bill Sheffield. However, the administrations from Governor Jay Hammond until now Governor Steve Cowper have consistently opposed Sale 92.

delay in the sale until at least 1994, and made other recommendations regarding tract deletions (including Alternative IV) and mitigation measures.

On December 12, 1985, the Secretary announced the decision to go forward with Sale 92, including the leasing of the nearshore tracts which the Governor and NMFS had recommended be deleted. On December 16, 1985, the Final Notice of Sale was issued.

Thereafter, the Petitioners filed suit in the United States District Court for the District of Alaska alleging that, in the administrative process which culminated in the issuance of the Final Notice of Sale for Lease Sale 92, the Secretary violated section 19 of the OCSLA, 43 U.S.C. § 1345, and provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, the ESA, 16 U.S.C. §§ 1531 *et seq.*, and the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101 *et seq.* The case was consolidated with two other cases filed in the United States District Court by Tribal Village of Akutan, *et al.* and Trustees for Alaska, *et al.*

On January 13, 1986, the district court issued a preliminary injunction and an order granting a partial stay of the preliminary injunction which, taken together, authorized the Secretary to receive the bids for Sale 92 but prohibited him from opening the bids, issuing leases, or otherwise proceeding with the lease sale. The injunction and partial stay were based on a finding that the plaintiffs had a substantial likelihood of success on the claims asserted under ANILCA. The Ninth Circuit affirmed the issuance of the preliminary injunction and partial stay.

Tribal Village of Akutan, et al. v. Hodel, 792 F.2d 1376 (9th Cir. 1986).

In *Amoco Production Company v. Village of Gambell*, 107 S.Ct. 1396 (1987), this Court held that Section 810 of ANILCA did not apply to the OCS. This Court also granted certiorari in this case and reversed and remanded it to the Ninth Circuit. *Amoco Production Company v. Tribal Village of Akutan*, 107 S.Ct. 1598 (1987). The Ninth Circuit then remanded the case to the district court. 816 F.2d 685 (1987).

On January 22, 1988, the district court denied the State of Alaska's claims under Section 19 of the OCSLA and granted partial summary judgment to the Respondents. The State of Alaska appealed. On March 11, 1988, the district court denied the claims under NEPA and the ESA and dismissed those counts.[5] All other plaintiffs appealed to the Ninth Circuit. In addition, the Petitioners and the other plaintiffs requested the district court to issue a stay pending appeal. On March 15, 1988, the district court granted the stay. On May 2, 1988, the Ninth Circuit affirmed the issuance of the stay. On May 20, 1988, the Ninth Circuit consolidated the appeals.

On October 5, 1988, the Ninth Circuit panel affirmed the district court decision and stayed the preliminary

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[5] The district court did not dismiss one count of the amended complaint filed by Tribal Village of Akutan, *et al.* relating to aboriginal rights in the OCS. In remand proceedings in Amoco Production Co. v. Village of Gambell, 107 S. Ct. 1396 (1987), the Ninth Circuit has now ruled that aboriginal rights have not been extinguished. The claim continues to be held in abeyance in district court pending a ruling on a petition for rehearing filed in the Ninth Circuit.

injunction pending remand to the district court. The effect of the October 5, 1988 stay was to permit the Secretary to proceed with the lease sale.

On October 7, 1988, the Petitioners, along with Ninth Circuit Appellants Tribal Village of Akutan, *et al.*, filed an Emergency Motion to Vacate Stay of Injunction Pending Remand and for Injunction Pending Rehearing *En Banc*.

The Petitioners were informed that the Sale 92 bids would be opened in Anchorage, Alaska on Tuesday, October 11, 1988 at 1:00 p.m. Eastern Time (9:00 a.m. Alaska Time) and the results announced at 3:00 p.m. Eastern Time (11:00 a.m. Alaska Time). As of October 11, 1988 at 9:00 a.m. Eastern Time, the Ninth Circuit had taken no action on the Emergency Motion.

Therefore the State of Alaska filed an application for a stay of the Ninth Circuit decision with Justice O'Conner, Circuit Justice for the Ninth Circuit. The application was denied. The bids were opened and leases subsequently issued.

On October 18, 1988, the Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* with the Ninth Circuit. On March 9, 1989 the Ninth Circuit issued an amended opinion adopting its earlier opinion except for minor amendments, otherwise denied the petition for rehearing, and rejected the suggestion for rehearing *en banc*. *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9th Cir. 1989). This petition follows.

REASONS FOR GRANTING THE WRIT

A. Summary

Section 19 of the OCSLA, 43 U.S.C. § 1345, represents an effort by Congress to incorporate fundamental principles of federalism into the process for making decisions regarding oil and gas leasing on the OCS. The responsibility for balancing the nation's need for new sources of oil and gas against the potential harm to renewable ocean resources is allocated between the Secretary and the Governor of the affected coastal state. Congress emphasized the role of the Governor by expressly providing that "[t]he Secretary *shall accept recommendations of the Governor* . . . if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c)(in part; emphasis added).

The Ninth Circuit failed to recognize that Congress consciously provided that the responsibility for striking the proper balance is to be shared. Instead, it effectively held that the Secretary has plenary decision-making power and (as he did here) may with impunity ignore the recommendations of an affected state's Governor.

This specific issue – the sharing of responsibility for decisions regarding the use of the nation's ocean resources – is of significant national importance standing alone. It takes on substantially greater significance in the broader context of federalism and state/federal relations generally.

The principles of federalism that were recognized even by the Framers of the United States Constitution

have retained their vitality over time. As recently as 1987, then President Ronald Reagan renewed the commitment to be guided by those principles by issuing Executive Order 12612. 52 Fed. Register 41665 (October 30, 1987). The Executive Order confirmed that "[i]n most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly."

Congress acted on the principles of federalism when it enacted section 19 of the OCSLA. The Ninth Circuit, however, failed to recognize that the states remain viable entities in our federalist form of government. In holding that the Secretary's authority is plenary and can be exercised with no regard for the views of an affected state's Governor, the Ninth Circuit usurps the authority of Congress and effectively takes away a state's ability to participate in the process, in violation of both the general principles of cooperative federalism and the specific command of section 19.

The Courts should recognize that federalism principles require that in the application or administration of a federal law, shared responsibility is presumed – it is the rule, not the exception-– unless Congress expressly says otherwise. Such a presumption is more than justified in this case not only because of the obvious federal *and* state interests involved, but also because in section 19 of the OCSLA, Congress expressly provided for a significant state role in oil and gas leasing decisions on the OCS.

For the foregoing reasons, review on writ of certiorari is called for under Supreme Court Rule 17.1(a)

because the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." It also is appropriate under Supreme Court Rule 17.1(c) because the Ninth Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court."

B. The Governor's recommendations struck a proper balance between the national interest and that of the state.

The decision of the Ninth Circuit panel regarding the amount of deference to be accorded a Governor under Section 19 of the OCSLA has extremely important consequences. Not only does it affect all of the coastal states in the Ninth Circuit,[6] but the decision also has substantial precedential value to other coastal states.

The enactment of Section 19 of the OCSLA was supposed to provide the Governor of an affected state with an important role in the process leading to the decision whether, where, and under what conditions oil and gas leases on the OCS would be issued. In order to give a coastal state real influence in determining the "size, timing and location" of the oil and gas lease sales off its coast, Congress provided that

> [t]he Secretary *shall* accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable

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[6] Alaska, Washington, Oregon, California, and Hawaii.

> balance between the national interest and the well-being of the citizens of the affected State. 43 U.S.C. § 1345(c).

(Emphasis added.)

Congress recognized that a coastal state may experience financial, environmental, social, cultural, and other societal effects as a result of OCS oil and gas activities. Some effects may be adverse, while others may be beneficial. Nonetheless, in the ordinary case, those consequences can be substantial. In an extraordinary setting, the adverse consequences could be catastrophic. Catastrophic risks certainly exist in this case.

The importance of this case (both to the State of Alaska and the nation) is obvious simply because it involves Bristol Bay, an area having incredible fisheries and other renewable resources. The recommendations of the Governor of Alaska in 1985 pointed out that

> [t]he proposed Sale 92 area is unique among the Nation's OCS planning areas. In no other planning area are such high biological values found in conjunction with such low hydrocarbon potential.
>
> . . . .
>
> As we have noted in previous correspondence, the fisheries resource values of the Sale 92 area represent an annual economic first wholesale value which can exceed one billion dollars and employ over 10,000 people. The marine mammals, waterfowl, and seabirds seasonally concentrated in the North Aleutian Basin also have a significant value to the people of Alaska, the Nation, and in some cases the world, that cannot be easily measured in monetary terms.

The Governor also noted the relatively slight contribution Sale 92 might make to the nation's energy supply:

> In contrast to the unparalleled biological values of the North Aleutian Basin, MMS estimates that the potential economic benefits of the North Aleutian Basin hydrocarbon resources are among the lowest of all the Nation's OCS planning areas. The SID for the current 5-year leasing program ranks the North Aleutian Basin as 14 out of the Nation's 18 OCS planning areas in terms of the net economic value of recoverable hydrocarbon resources.

The Governor then compared the potential benefit to the nation from leasing with the potential adverse impact to both the state and the nation, and made specific recommendations regarding the size, timing, and location of the proposed sale:

1. The timing of the lease sale in the North Aleutian Basin should be delayed until at least 1994;

2. The size and location of any lease sale in the North Aleutian Basin should not include the near shore tracts identified in Enclosure I; and

3. The lease sale stipulations and Information to Lessees for any lease sale in the North Aleutian Basin should incorporate the most up-to-date provisions regarding mitigation of potential environmental damage as described in Enclosure II.

Section 19 was specifically intended to require the Secretary to give substantial deference to the recommendations from an affected coastal state's Governor. That, unfortunately, is not what happened. The Secretary effectively ignored the Governor's recommendations and made his own independent decision regarding the size, timing, and location of the sale as if the Governor's role in the process was the same as that of any other member of the public who may comment on proposed federal actions. This placed the Governor's role and influence at

the pre-1978 OCSLA amendment level, a level the plain wording and legislative history of the statute make clear the amendments were supposed to increase. In affirming the Secretary's actions, the Ninth Circuit then sanctioned his departure from the requirements of section 19.[7]

C. The Secretary of the Interior failed to give the recommendations of the Governor of Alaska the deference to which they were entitled under section 19 of the OCSLA.

The statutory authority and responsibility provided in section 19 for the Governor to influence OCS leasing grew out of Congressional recognition that the pre-1978 OCSLA process was entirely inadequate for the states because it left the decision-making process virtually to the unrestrained discretion of the Secretary.

As Congress recognized,

> [f]ederal administration of the leasing program and Federal regulation of offshore oil and gas development have been essentially a closed process involving the Secretary of the Interior and the oil industry. While the Secretary has on occasion sought or heard outside views, he has done so by rules established in his own discretion. Decision-making for the development of offshore oil and gas must be opened so that the coastal and other States

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[7] The Ninth Circuit incorrectly ruled that

> [e]ven if we agreed that the Governor's recommendations were reasonable, we could not conclude the Secretary was arbitrary or capricious simply because he chose to reject them.

Tribal Village of Akutan v. Hodel, 869 F.2d at 1190.

> affected by offshore oil and gas activities may participate in the process on a regular basis and so that affected local communities and the public at large may have an opportunity to be heard.

House Report 95-590, 95th Congress, 1st Session, at page 54, reprinted in (1978) U.S. Code Cong. & Admin. News at 1461.

Congress adopted section 19 "to insure that Governors of affected States . . . have a leading role in OCS decisions and particularly as to potential lease sales and development and production plans." *House Conference Report* 95-1474, 95th Cong., 2d Sess. at 106, reprinted in (1978) U.S. Code Cong. & Admin. News, at page 1705.

A Governor has only one meaningful opportunity to influence the Secretary's decision regarding the "size, timing, or location of a proposed lease sale" in a particular area of the OCS. That opportunity is the one provided for in section 19 of the OCSLA and is available only before a lease sale actually occurs. After the Secretary opens bids and awards leases the focus of attention shifts to the exploration and development and production plans for particular leases. There is an obvious and significant difference between influencing the configuration of a lease sale and the activities that will occur on a particular lease.

In addition, now that the bids have been opened and leases issued to particular companies, it is difficult and expensive for the government to reacquire what will have

become vested property rights.[8] Thus, section 19's pre-sale importance cannot be overstated.

Other legislative history relating to Section 19 also clearly stated the intent of Congress:

> Specific input is also required for certain key OCS decisions. *All recommendations by a Governor of an affected State,* and through Governors, heads of affected local government units, with regard to a proposed lease sale or a proposed development and production plan, must be submitted within 60 days and *must be accepted by the Secretary if he determines that they are consistent with the national interest.* (emphasis added)
>
> *H. Rep.* 95-590, *supra* at page 50.

The legislative history is clear that the Secretary may not simply substitute his judgment of the reasonable balance if the Governor's recommendations do strike that

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[8] On October 11, 1988, the bids for Lease Sale 92 were opened and publicly announced in Anchorage, Alaska. The bids were then evaluated and accepted or rejected within 90 days of the opening of the bids. Thereafter, leases were executed. At that point, a property interest was conveyed to the successful bidders (now lessees), Union Oil Co. of California v. Morton, 512 F.2d 743 (9th Cir. 1975), and the suspension and cancellation provisions of 43 U.S.C. § 1334 and 30 C.F.R. § 250.12, which include the requirement of the payment of compensation in most instances of cancellation, attached.

Thus, even though "by purchasing a lease, lessees acquire no right to do anything more . . . ," Secretary of the Interior v. California, 104 S. Ct. 656, 671 (1984); Village of False Pass v. Clark, 733 F.2d 605, 608 (9th Cir. 1984), substantial legal and financial consequences now come into play, 43 U.S.C. § 1337(b)(4), making cancellation of leases financially and legally difficult for the Secretary.

balance. He is obligated to accept those recommendations. House Conf. Rep. 95-1474 at page 107 stated that "[b]oth versions and the conference report require acceptance of a Governor's recommendations if the Secretary of the Interior determines that the recommendations provide a reasonable balance between the national interest and the well-being of citizens of the affected State."[9]

The plain wording of section 19 supports the argument that it was meant to require the Secretary to give a significant amount of deference to the recommendations of a Governor of an affected State. That significant amount of deference includes, as the statute quite clearly says, requiring the Secretary to "accept the recommendations of the Governor . . . if they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state." 43 U.S.C. § 1345(c). In other words, if a rational basis for the Governor's recommendations exists, the Secretary's rejection of those recommendations then would be arbitrary and capricious. See 43 U.S.C. § 1345(d), supra.

A comparison of section 19 with section 18 of the OCSLA provides added support for this analysis.[10] To interpret sections 18 and 19 as requiring the Secretary to

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[9] The Ninth Circuit failed to even discuss the legislative history which supports the petitioner's interpretation of section 19.

[10] Section 18 provides the Governor with the opportunity to comment on a proposed 5-year leasing plan, stating in relevant part:

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give the recommendations of the Governor the same consideration in both situations is to ignore the obvious differences in the language of each section.

Under section 18, although an affected coastal state's comments are to be specifically considered by the Secretary, there is no requirement that the Secretary accept them if they meet certain statutory requirements. The Secretary need only deny, grant or modify a request contained in the comments as "the Secretary considers appropriate." Section 19, on the other hand, requires the Secretary to be at least "conditionally bound" by the recommendations of the Governor when those recommendations have struck a reasonable balance between the national interest and the well-being of the citizens of Alaska. *Commonwealth of Massachusetts v. Clark*, 594 F. Supp. 1373, 1384 (D. Mass. 1984). Such a plain difference in the meaning and impact of sections 18 and 19 must be recognized as establishing different review standards for the Secretary's decisions under them.

Section 19 of the OCSLA requires the Secretary to give substantial deference to the recommendations of the Governor, for this is the only way to assure that the Governor would have a "leading role in OCS decisions

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During the preparation of any proposed leasing program under this section, the Secretary shall invite and consider suggestions for such program from any interested Federal agency, including the Attorney General, in consultation with the Federal Trade Commission, and from the Governor of any State which may become an affected State under such proposed program.

43 U.S.C. § 1344(c)(1).

and particularly as to potential lease sales. . . ." H.R. Report No. 95-1474, 95th Cong., 2d Sess., at 106 (1978). By affirming the Secretary's decision with respect to Sale 92, however, the Ninth Circuit essentially ruled that the Governor's recommendations were entitled to no more weight than those of any member of the general public. The decision eviscerated the Governor's special role under section 19.

D. The Secretary's refusal to delay Sale 92 until at least 1994 or to delete the sensitive near shore tracts from Sale 92 was arbitrary and capricious.

It is beyond dispute that the biological resources and other values of Bristol Bay are vast. To describe Bristol Bay as the crown jewel of Alaska's renewable resources is no overstatement. The importance of Bristol Bay and its resources to the state – and to the nation and perhaps the world – cannot be overlooked.

It is also beyond dispute that the State of Alaska continues to support the prudent development of Alaska's oil and gas resources. The State of Alaska objected to this sale because when balancing the risk to the resources of Bristol Bay against a relatively low potential for hydrocarbon recovery, it was clear to the Governor that the Secretary should at least delay the sale and remove sensitive nearshore tracts from the sale when it was held.

The Governor categorically described how each recommendation fit well in advancing both the well-being of the citizens of Alaska and the national interest.

And yet, the two most important recommendations were rejected.[11] That rejection was arbitrary and capricious.

Oil and gas leasing, exploration and development proceed in stages, *Secretary of the Interior v. California*, 104 S.Ct. 656 (1984), and the Secretary will have the opportunity to refine his analysis as the stages progress. The Ninth Circuit's consideration of the Risk Analysis suggests, however, that at the lease sale stage, the Risk Analysis has little or no meaning in the process. That made it relatively easy to ignore the impact of the flawed Risk Analysis on the section 19 decision of the Secretary.

One of the essential purposes for the preparation of an Risk Analysis is to provide a decision-maker with the information necessary to make an informed decision about the impacts from an oil spill. In this case that information was needed to help make a decision as to where, when, and under what conditions to proceed with Lease Sale 92. The Risk Analysis was an important part of that information. Since the Risk Analysis contained fundamental errors, it is axiomatic that the decision of the Secretary on issues which rely on the Risk Analysis for support is also fundamentally in error.

The whole idea of the Risk Analysis is to give the Secretary accurate information about the lease sale area and environment in order that he be able to make proper

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[11] See Governor's recommendations at page 17, *supra*. The measures identified by the Governor in recommendation #3 are for the most part mandated by 43 U.S.C. § 1347(b). Thus, any argument that the Secretary in fact accepted most of the Governor's recommendations (because many of the stipulations were accepted at least in part) would be at best disingenuous.

decisions about the "size, timing or location" of the sale. If the Risk Analysis is unreliable, it cannot be relied upon so heavily by the Secretary in his decision. Because he did so, however, the decision is arbitrary and capricious.

The most important error made by the Secretary in the Risk Analysis involved the allocation of the amount of oil in Alternatives I and IV, thus substantially understating the environmental benefits of Alternative IV.[12] Even though the Governor pointed out this error and explained why it caused a serious mistake in the Secretary's analysis of the risks and benefits of the different Alternatives for Sale 92, the Secretary either ignored or rejected that information. The Secretary then rejected the section 19 recommendations of the Governor. By doing so, the Secretary confirmed that although Congress meant the section 19 process to give the Governor real influence at the lease sale stage, in practice it did not

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[12] The Secretary assumed that the proposed sale area contained 279 million barrels of oil, while Alternative IV contained 254 million barrels. The Secretary apparently assumed that only a small portion of the oil (25 million barrels) was contained in the nearshore tracts deferred from leasing in Alternative IV. He arrived at this figure by subtracting the conditional resource estimate of Alternative IV from that of Alternative I. In so doing, he made a significant error.

Conditional resource estimates (i.e., the amount of oil expected to be found) like those used by the Secretary are not absolute numbers. Instead, they are premised on a specific probability that such oil will be found. The Secretary estimated that there was a 20% chance of finding oil in the Alternative I area, but only a 14% chance of finding oil in the Alternative IV

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happen. The Ninth Circuit then affirmed that view of section 19.

The Secretary's mistake with respect to the comparison of Alternative I and Alternative IV was not the only mistake made in the Risk Analysis. Another significant error made by the Secretary related to the oil spill trajectories themselves. The EPA, based on its expert review of the Risk Analysis, found that the Secretary had erroneously failed to take into account the seasonality of the weather and the seasonal presence of fish and wildlife in Bristol Bay:

> EPA believes that a seasonal oil trajectory analysis should be presented for [the North Aleutian Basin] that evidences definite seasonal trends in weather (wind direction), presence of biota, and the presence of sensitive and vulnerable life stages. In the case of the North Aleutian Basin EIS, the analysis is important for two reasons. First, moderate to major impacts are identified for many species based on their seasonal occurrence in the nearshore area. . . . Second, the seasonal conditional probabilities are needed to identify which launch points pose a high seasonal risk to various sea targets, biological resource areas, and land segments.

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area. One cannot subtract these two conditional resource estimates without taking into account the difference in probabilities any more than one can subtract the numerators in fractions without accounting for the denominators. When the difference in probabilities is properly taken into account, the conditional resource estimate for the near shore tracts is a 7% chance of finding 289 million barrels of oil. Thus the Secretary's estimate of 25 million barrels was incredibly low with respect to the actual conditional resource estimate. For this reason, the risks associated with leasing the near shore tracts were also incredibly low.

> . . . Using average annual probabilities as the basis for impact assessment in an area that shows significant seasonal trends in use of critical habitat, concentration of individuals of various populations, and presence of sensitive life stages may significantly understate the potential for impacts.

The reference to wind direction is of particular importance, for the prevailing winds in Bristol Bay blow in different directions in the summer and winter. Accordingly, averaging the trajectories over an entire year obscures important seasonal differences in where the oil might go (and hence which important resource areas might be affected), and may have the effect of canceling out higher probabilities of a spill contacting a certain area at certain times of the year. This is especially significant in light of the fact that many valuable species are present in the area seasonally. Thus, a realistic assessment must be based on the likelihood of a spill reaching these resources under weather conditions which are present at the times the species of concern are also present in Bristol Bay. As NMFS stated:

> We remain concerned that the oil spill risk analysis does not realistically portray the likelihood of an oilspill reaching coastal regions or other important resource habitats. The methods used to calculate the trajectory-target probabilities are not sensitive to the high seasonality in use and concentrations in abundance of many of the populations in the lease area. Six-month averaging of trajectory results and 12-month averaging of their probabilities do not identify vulnerable locations during peak use periods nor do they foretell particular seasonal weather conditions that could result in especially critical oil spill transport patterns.

The Secretary provided no real defense of his position, resorting again to an unsubstantiated assertion that he had proceeded correctly. This cannot suffice as an explanation of a fallacy in the Secretary's methodology. EPA and NMFS were not presenting alternative methodologies, but instead were pointing out that the Secretary's methodology was irrational – i.e., arbitrary and capricious.

These flaws fundamentally affected the analysis of impacts. By understating the risks of leasing, they resulted in a more sanguine view of the potential impacts of leasing. If the Secretary had recognized seasonal variations in weather and fish and wildlife use of the region, he may well have concluded that Alternative IV, or even no sale at all, was preferable to leasing the entire area.

In short, the Secretary's rejection of the recommendations of the Governor of Alaska was arbitrary and capricious.

CONCLUSION

For the past 11 years coastal states have faced an uphill battle for the rights that they thought were secured by the 1978 amendments to the OCSLA. Although determining when and where to lease on the OCS is no longer a "a closed process," it also is not one in which the states have been accorded the role and influence to which they are entitled. This was especially true for Alaska with respect to Sale 92.

For the foregoing reasons, the Ninth Circuit's decision should be reviewed and reversed by this Court. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 7, 1989

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRIBAL VILLAGE OF AKUTAN; TRIBAL VILLAGE OF TOGIAK, a federally recognized Tribe; THE TRIBAL VILLAGE OF NELSON LAGOON, a federally recognized Tribe; STEVE COWPER; GOVERNOR OF ALASKA, et al., *Plaintiffs-Appellants,* v. DONALD HODEL, Secretary of the Interior; and UNITED STATES DEPARTMENT OF THE INTERIOR; *Defendants-Appellees,* AMOCO PRODUCTION COMPANY; ARCO ALASKA, INC.; CHEVRON USA, INC., et al.; INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS, *Defendant-Intervenors/ Appellees.*	Nos. 88-3610; 88-3703; 88-3729 D.C. Nos. CV-J-85-38 CV-J85-37 CV-85-701 ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, Senior District Judge, Presiding

Argued and Submitted
August 4, 1988 – Anchorage, Alaska

Filed October 5, 1988
Amended March 9, 1989

Before: Thomas Tang, Alex Kozinski and David R. Thompson, Circuit Judges.

Opinion by Judge Kozinski

SUMMARY

Environmental Law

Affirming a judgment approving the Secretary's decision to go forward with Outer Continental Shelf Sale 97 [sic: 92], the court held that under the Outer Continental Shelf Lands Act segmented approach, the Secretary's actions met the standards applicable to each stage.

Appellant the Tribal Village of Akutan and others concerned with the preservation of Alaska's fisheries (Alaska), appeal the district court's grant of summary judgment in favor of the appellee Secretary of the Interior. Appellants have sued to enjoin the Secretary from conducting Lease Sale 92 in the North Aleutian Basin on the grounds that the Secretary has failed to comply with the National Environmental Policy Act (NEPA), The Endangered Species Act (ESA), and the Outer Continental Shelf Lands Act (OCSLA).

[1] Section 19 of OCSLA, 43 U.S.C. § 1345, entitles the governor of an affected state to submit recommendations regarding the proposed lease sale to the Secretary. The Secretary must accept these recommendations if he determines that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. The Secretary's acceptance or rejection of the recommendations are final unless found to be arbitrary or capricious. [2] Alaska contends that a reviewing court should determine whether the

governor's recommendations fall within the range of reason, not whether the Secretary was arbitrary of capricious in rejecting them. [3] However, under section 19, the court cannot substitute its judgment for that of the Secretary. [4] Alaska's arguments that the Secretary's decision was made without consideration of the Governor's recommendations and in reliance on flawed data lack merit. [5] The governor also had a fair opportunity to comment on the original lease sale proposal, which was not altered in any significant way. [6] NEPA is a procedural statute designed to ensure that federal agencies are fully aware of the impact of their decisions on the environment. Section 102 of NEPA, 42 U.S.C. § 4332, requires in every recommendation for major Federal actions significantly affecting the quality of the human environment, an environmental impact statement (EIS). [7] Appellants contend that the EIS suffered from errors infecting the preparation of the oil spill risk analysis. [8] The analysis of this scenario was unnecessary at the lease sale stage. The amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA's stages. [9] Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires federal agencies, with the assistance of the Secretary, to insure that any action authorized is not likely to jeopardize the continued existence of any endangered or threatened species. The federal agency must consult the service having jurisdiction over the relevant endangered species. [10] Appellants contend that the Secretary failed to fulfill his section 7(a)(2) responsibilities by rejecting one of the National Marine Fisheries Service (NMFS) alternatives for the protection of gray whales. [11] The Secretary's departure from the suggestions in NMFS's biological

opinion does not by itself constitute a violation of ESA; he satisfied section 7(a)(2) if he took alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species. This determination is made in light of OCSLA's multi-stage structure. [12] The steps taken by the Secretary were adequate and his decision to reject some of NMRS's alternatives was neither arbitrary nor capricious. [13] Further, the Secretary adopted other mitigating measures. [14] The risks to endangered species during the lease sale stage are virtually nonexistent.

COUNSEL

Carol H. Daniel, Alaska Legal Services Corporation, Anchorage, Alaska; Eric Smith, Anchorage, Alaska; Gary I. Amendola, Assistant Attorney General, State of Alaska, for the plaintiffs-appellants.

Jacques B. Gelin, Attorney, Land & Natural Resources Division, United States Department of Justice, for the defendants-appellees.

E. Edward Bruce, Covington & Burling, Washington, D.C.; Carl J. D. Bauman, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, Alaska; Nathan S. Bergerbest, Doyle & Savit, Washington, D.C.; Cathy Dobbs, Dobbs, Berger, Molinari, Casalnuovo, Vannelli & Nadel, San Francisco, California, for the intervenors-appellees.

John A. Saurenman, Deputy Attorney General, State of California; Kathleen A. Weeks, Pacific Legal Foundation, Sacramento, California, for the amici.

ORDER

The opinion, published at 859 F.2d 651 (9th Cir. 1988), is amended as follows:

On page 658, column two, first complete paragraph, replace the first sentence: "We are the least troubled by what may seem to be incomplete or speculative data at the lease sale stage."

On page 658, column two, first complete paragraph, fifth sentence, replace "any errors in analysis" with "any technical deficiencies."

On page 659, column 1, first full paragraph, change the third sentence to read:

> We need not consider whether the oil spill risk analysis was in fact flawed by a deficiency in methodology; we need only consider whether use of the particular methodology employed in preparing the oil risk spill analysis is reasonable. As we previously stated, "NEPA does not require that we decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements . . . as to methodology."

On page 659, column two, line two, add the following footnote at the end of the first sentence:

> [1]The omission of speculative information from an environmental impact statement prepared at the lease sale stage is permissible; however, an environmental impact statement which is incomplete due to the omission of ascertainable facts, or the inclusion of erroneous information, violates the disclosure requirement of 42 U.S.C. § 4332(2)(C).

On page 662, column 1, line 3, change the first four sentences of the first full paragraph to read:

> Appellants make the additional claim that NMFS's biological opinion violated section 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4), by failing to specify the impact of any incidental takings of endangered whales. The NMFS concluded that any incidental taking would be prohibited under pertinent provisions of the ESA and section 101(a)(3)(B) of the MMPA. 16 U.S.C. § 1371(a)(3)(B), and therefore did not include a statement specifying the impact of incidental takings. *See Biological Opinion* at 26, 2 FEIS at H-7. The NMFS's interpretation of its obligation under section 7(b)(4) was correct.

The petition for rehearing is otherwise denied. The full court has been advised of the suggestion for rehearing en banc and no judge having requested a vote thereon, the suggestion is rejected. Fed. R. App. P. 35(b).

OPINION

KOZINSKI, Circuit Judge:

The Tribal Village of Akutan and two other tribal villages, the Trustees for Alaska and twelve other environmental organizations, and the State of Alaska and seven organizations concerned with the preservation of Alaska's fisheries (Alaska), appeal the district court's grant of summary judgment in favor of the Secretary of the Interior, the Department of the Interior, the National Marine Fisheries Service and nineteen intervenors (Secretary). Appellants have sued to enjoin the Secretary from conducting Lease Sale 92 in the North Aleutian Basin (also referred to as Bristol Bay) on the grounds that the Secretary has failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1982 & Supp. IV 1986), the Endangered Species Act, (ESA), 16

U.S.C. §§ 1531-1543 (1982 & Supp. IV 1986), and the Outer Continental Shelf Lands Act, (OCSLA) 43 U.S.C. §§ 1331-1356 (1982 & Supp. III 1985).

I. Facts

The development and operation of offshore oil wells is controlled by OCSLA, which establishes a national policy of making the outer continental shelf "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). The Act establishes four distinct stages in the administrative process: (1) formulation of a five-year leasing plan by the Secretary; (2) lease sales; (3) exploration by the lessees; and (4) development and production. *Secretary of the Interior v. California*, 464 U.S. 312, 337 (1984); *Village of False Pass v. Clark*, 733 F.2d 605, 608 (9th Cir. 1984). "Each stage involves separate regulatory review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS [outer continental shelf]." *Secretary of the Interior v. California*, 464 U.S. at 337.

During the first stage of OCSLA, the Secretary prepares a Five-Year OCS Oil and Gas Lease-Sale Schedule. 43 U.S.C. § 1344. The Secretary must request comments from federal agencies and governors of affected states before submitting the proposed program of lease sales to the President and Congress. *Id.* at § 1344(c)-(d).

In the second stage, the Secretary conducts lease sales of tracts on the outer continental shelf. Before soliciting bids and awarding leases, the Secretary must comply with a detailed combination of investigating, consulting and reporting requirements. Most significantly, the Secretary's review of environmental consequences must meet both NEPA standards. *Village of False Pass*, 733 F.2d at 609 (interpreting 43 U.S.C. § 1346(a)(1)), and ESA requirements, *Id.* (while not mentioned in OCSLA, ESA "applies of its own force and effect"). Under OCSLA, the Secretary must also consult with the governor of any affected state, *see, e.g.*, 43 U.S.C. §§ 1344(b)(3), 1345(a), and accept the governor's recommendations if the Secretary believes they strike a reasonable balance between the national interest and the well-being of the citizens of the affected state. *Id.* at § 1345(c).

After the lease sale has been completed, the highest qualified bidder is granted a lease which entitles him to conduct limited preliminary activities such as geophysical surveys. However, "by purchasing a lease, lessees acquire no right to do anything more. Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production . . . ; the lessee acquires only a priority in submitting plans to conduct these activities." *Secretary of the Interior v. California*, 464 U.S. at 339.

Prior to embarking on the third stage of the OCSLA process – exploration of the lease sale area – a lessee must submit an exploration plan and an environmental report, which are subject to further review. There is yet another round of review before the lessor may enter into the final

stage – development and production of oil. "If [the lessee's] plans, when ultimately submitted, are disapproved, no further exploration or development is permitted." *Id.* This four-level review process gives the Secretary a "continuing opportunity for making informed adjustments" to the process of developing offshore oil wells in order to ensure all activities are conducted in an environmentally sound manner. *Village of False Pass*, 733 F.2d at 616 (quoting *Sierra Club v. Morton*, 510 F.2d 813, 828 (5th Cir. 1975)).

In November 1974, the Secretary began studying the possibility of leasing tracts for oil and gas production in the North Aleutian Basin off the southwest coast of Alaska. This region is important economically and ecologically. The fisheries of the North Aleutian Basin are "among the most productive in the world," Alaska Outer Continental Shelf Region. Minerals Management Service, U. S. Dep't of the Interior, 1 *Final Environmental Impact Statement, North Aleutian Basin Sale 92* III-C-1 (1985) [hereinafter cited as FEIS], important both for commercial and sport fishing. The area is also the home of endangered species of marine mammals and birds. Eighty percent of the current eastern population of Pacific gray whales migrates through the Bristol Bay's Unimak Pass during the spring and fall.

After twice canceling plans for lease sales in the bay at Alaska's request, the Secretary submitted a five-year oil and gas leasing schedule in 1982 which proposed the lease sale of all 32.5 million acres of the North Aleutian Bay. This lease sale, denominated Lease Sale 92, was scheduled for April 1985. In March 1984, in response to concerns expressed by the Governor of Alaska, the Secretary restricted leasing to the southwest corner of the

region by deleting nearly 83 percent of the acreage from the sale.

The Secretary then proceeded to follow the statutory prelease process: He solicited resource reports from federal and state agencies; solicited comments from the oil industry, governmental agencies, environmental groups and the general public; prepared both a draft and final environmental impact statement as required by NEPA; obtained biological opinions from the Fish and Wildlife Service and the National Marine Fisheries Service as required by ESA; conducted public hearings; and consulted at length with the Governor of Alaska and other state officials.

In his formal recommendations to the Secretary, the Governor objected to the timing, size, location and terms of the proposed lease sale of the remaining 5.6 million acres. He requested a number of changes, including an additional eight-year delay in the sale and the deletion of all tracts within twenty-five miles of the Alaska Peninsula. Letter from Booth Gardner [sic: Bill Sheffield], Governor of the State of Alaska, to Donald Hodel, Secretary, Department of the Interior (November 5, 1985) at 2, Excerpts of Record (ER) at 33. The Secretary rejected both recommendations, *see* U.S. Dep't of the Interior. *Statement of the Reasons for the Decision on Sale 92* (Dec. 1985), ER at 35 [hereinafter cited as *Statement of Reasons*], although he accepted the Governor's other mitigating measures. On December 16, 1985, the Secretary published a final notice of sale in the Federal Register, 50 Fed. Reg. 51372-80 (1985).

Litigation began later that month, as appellants filed three suits, later consolidated by the district court, to

enjoin the Secretary from proceeding with Lease Sale 92. Appellants claimed the proposed sale violated OCSLA, NEPA, ESA and the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101-3233 (1982 & Supp. IV 1986). Relying on our decision in *Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985) [*Gambell II*], *rev'd. in part, vacated in part sub nom. Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987), the district court concluded that the Secretary had violated section 810 of ANILCA, 16 U.S.C. § 3120, and that such a violation automatically entitled plaintiffs to injunctive relief.

Appellees immediately obtained a partial stay of the district court's preliminary injunction to prevent cancellation of the sale pending appeal. In *Tribal Village of Akutan v. Hodel*, 792 F.2d 1376 (9th Cir. 1986), *vacated*, 107 S. Ct. 1598 (1987), we upheld the preliminary injunction as required by *Gambell II*. While a petition for certiorari in *Akutan* was pending in the Supreme Court, the Court reversed *Gambell II*, holding that section 810 of ANILCA, 16 U.S.C. § 3120, establishing procedures to protect Alaskan natives' use of public lands, does not apply to land in the outer continental shelf; and that violations of the Act do not require an automatic injunction. *Amoco Production Co.*, 480 U.S. 531. The Court then granted certiorari in *Akutan*, and remanded to this court. 107 S. Ct. 1598 (1987). The Secretary did not seek to vacate the preliminary injunction but instead, agreed to an expedited resolution of the remaining issues. We remanded to the district court, which granted summary judgment for the Secretary on all counts, but enjoined the lease sale pending appeal. We denied the Secretary's motion to vacate the injunction.

Appellants make three claims. First, they contend that the Secretary's rejection of the Governor's key recommendations to delay and limit the area of the sale was arbitrary and capricious, thus violating section 19 of OCSLA, 43 U.S.C. § 1345. Second, they claim that the environmental impact statement prepared for Lease Sale 92 was so flawed by methodological and procedural errors that it did not satisfy the requirements of NEPA. Finally, they claim that the Secretary violated ESA by rejecting some of the reasonable and prudent alternatives recommended by the National Marine Fisheries Service (NMFS), and by relying on a biological opinion which was itself fundamentally flawed. We consider each claim in turn.

As the district court granted summary judgment on all these claims, we stand in the district judge's shoes in reviewing his decision: "[W]e may affirm a summary judgment only if, viewing the evidence in the light most favorable to the party against whom it is granted, we find no genuine issue of material fact, and we find that the prevailing party is clearly entitled to judgment as a matter of law." *California v. Watt*, 683 F.2d 1253, 1258 (9th Cir. 1982) (citations omitted), *rev'd on other grounds sub nom. Secretary of the Interior v. California*, 464 U.S. 312 (1984).

II. The OCSLA Claim

[1] Section 19 of OCSLA, 43 U.S.C. § 1345, entitles the governor of an affected state to submit recommendations "regarding the size, timing, or location of a proposed lease sale" to the Secretary. *Id.* as § 1345(a). The Secretary must accept these recommendations "if he determines,

after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." *Id.* at § 1345(c). Section 1345(d) provides that the Secretary's acceptance or rejection of the recommendations shall be final "unless found to be arbitrary or capricious."

As we noted in *California v. Watt*, the scope of our review is limited: "In determining whether the Secretary's rejection of the governor's recommendations was arbitrary or capricious, we must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." 683 F.2d at 1268. The court must decide whether the Secretary "articulate[d] a rational connection between the facts found and the choice made," *id.* at 1269 (citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)), and "whether the Secretary made the decision in accordance with his duty under law," *id.* (citing *American Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 904-05 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979)).

[2] Alaska contends that the district court made two errors in determining that the Secretary's rejection of the governor's recommendations was not arbitrary or capricious. First, Alaska claims that the district court misinterpreted section 19 of OCSLA. Under Alaska's reading of the statute, if the governor has balanced the national interest and the well-being of the citizens of the state in an objectively reasonable way, the Secretary must defer to the governor's recommendations. A reviewing court

should therefore determine whether the governor's recommendations fall within the range of reason, not whether the Secretary was arbitrary or capricious in rejecting them.

[3] This analysis is in accord with neither the statutory language nor our precedents. The plain language of section 19 limits the court to reviewing the rationality of the Secretary's determination; the court cannot "substitute its judgment for that of the [Secretary]." *California v. Watt*, 683 F.2d at 1269 (dismissing a similar argument that the Secretary must accept the governor's recommendations if they "provided for a reasonable balance between national and state interests." *id.* at 1268). Even if we agreed that the Governor's recommendations were reasonable, we could not conclude the Secretary was arbitrary or capricious simply because he chose to reject them.

[4] Alaska offers a second reason for reversing the Secretary's decision: It was made without due consideration of the Governor's recommendations and in reliance on flawed data. Alaska alleges the Secretary made a number of specific errors: He disregarded OCSLA's requirement to base the determination of national interest "on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies of this subchapter" as required by section 19(c) of OCSLA, 43 U.S.C. § 1345(c); he failed to make sufficient findings concerning the protection of fisheries; he relied on erroneous economic calculations in refusing to delay the sale at least eight more years; and he based his refusal to defer the sale of 137 near-shore tracts on a flawed oil spill risk analysis.

None of these contentions has merit. As the district court held, the Secretary adequately balanced the nation's interest in developing oil and gas supplies against its policy of protecting the environment, *see Statement of Reasons* at 2-35, and specifically discussed the importance of preserving the bay's fisheries. *Id.* at 17-20, 22-26. Contrary to appellant's suggestion, the Secretary carefully compared the costs and benefits of the proposed lease sale with those of the governor's plan. In making his cost-benefit analysis, the Secretary relied on experts' assessments of the net economic value of the lease sales and the probability and impact of oil spills. In attacking the accuracy of the experts' calculations, Alaska uncovers no fundamental flaws or irrationality; rather, Alaska only succeeds in showing it prefers the results reached by a different methodology.

[5] Finally, Alaska argues that the Secretary did not give the Governor a meaningful opportunity to comment on the net economic value calculations used in planning Lease Sale 92. Although the Secretary formally solicited the Governor's comments on the original lease sale proposal, the Secretary did not resubmit the proposal to the Governor after making minor revisions in net economic value calculations. However, as the Governor had a fair opportunity to comment on the original lease sale proposal, which was not altered in any significant way, OCSLA does not require a second round of consultation.

Because the Secretary complied with the duties imposed by statute, and "articulate[d] a rational connection between the facts found and the choice made." *California v. Watt*, 683 F.2d at 1269, we agree with the district

court that the Secretary's decision to reject the Governor's suggestions was not arbitrary or capricious.

III. The NEPA Claim

[6] NEPA is a procedural statute designed to "ensure that federal agencies are fully aware of the impact of their decisions on the environment." *Oregon Envt'l Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). Section 102 of NEPA, 42 U.S.C. § 4332, requires all agencies of the federal government to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action . . . [and] alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(i) and (iii). Before preparing an environmental impact statement, the responsible federal official "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C).

Our review of an environmental impact statement is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(D), which empowers a court to strike down agency actions taken "without observance of procedure required by Law." *Kunzman*, 817 F.2d at 492. In applying this standard, the district court must determine whether the environmental impact statement contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences," and provides information which is reasonably sufficient to encourage

informed public participation and to "enable the decisionmaker to consider the environmental factors and make a reasoned decision." *Id.* at 492-93 (citations omitted). A court may not strike down an environmental impact statement because of minor technical deficiencies. *Id.* Findings of fact underlying the district court's decision may not be overturned unless they are clearly erroneous. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 696 (9th Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 1319 (1988), while the legal adequacy of an environmental impact statement is a question of law, which we review de novo. *Id.*

[7] Appellants contend that the environmental impact statement prepared for Lease Sale 92 suffered from three fundamental errors, two methodological and one procedural. The alleged methodological errors infected the preparation of the oil spill risk analysis. First, appellants claim the Secretary's analysis was based on a significant underestimation of the amount of oil that might be spilled in the environmentally sensitive near-shore tracts. Because of this error, they argue, the Secretary was unable to make an accurate assessment of the benefits that would accrue from deleting these tracts from the lease sale area. Second, appellants allege that the analysis did not consider such variables as seasonal changes in the weather and the movement of seasonal fish and wildlife. Finally, appellants point to a procedural error: In failing to disclose all of the underlying assumptions on which the oil spill risk analysis was based, the Secretary violated his duty to "make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that

information." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282-83 (9th Cir. 1974).

The Secretary vigorously contests these claims. He argues that the oil spill risk analysis was adequate given the inherently speculative character of such analyses at an early stage in the planning process; that there are serious methodological flaws in appellant's own methodology; and that, in any event, the difference between the Secretary's results and those of the appellants is statistically insignificant.

[8] The question of whether the Secretary's analysis was adequate to meet the requirements of NEPA is largely disposed of by our reasoning in *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984). In that case, appellants argued that the environmental impact statement prepared for a proposed lease sale of offshore drilling locations violated NEPA because it failed to consider a worst case scenario of a 100,000-barrel oil spill. Holding that such an analysis was unnecessary at the lease sale stage, we announced the general principle that the amount and specificity of information necessary to meet NEPA requirements varies at each of OCSLA's stages. This principle has been adopted by other circuits, *see, e.g., Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), *cert. denied*, 434 U. S. 1064 (1978); *Sierra Club v. Morton*, 510 F.2d 813, 828 (5th Cir. 1975), and approved by the Supreme Court. *Secretary of the Interior v. California*, 464 U.S. 312 (1984).

Prior to exploration, it is difficult to make so much as an educated guess as to the volume of oil likely to be produced or the probable location of oil wells. Without

this information, an oil spill risk analysis can never be more than speculative, regardless of what methodology is used. More accurate information will be available at later stages of the exploration process, and the Secretary can make appropriate alterations in the oil development plan at that time. Furthermore, any technical deficiencies at the lease sale stage are unlikely to result in environmental damage, as a lease sale "does not directly mandate further activity that would raise an oil spill problem." *Village of False Pass*, 733 F.2d at 616, citing *Secretary of the Interior v. California*, 464 U.S. at 317. We reached a similar conclusion in *California v. Watt*, 683 F.2d at 1267, where we approved an environmental impact statement even though its oil spill risk analysis was based on a fifty percent underestimation of oil reserves. We noted that "additional Environmental Impact Statements will be required at the later exploration, production, and development stages, and these will, of course, be based on the latest reserve estimates available at the time they are prepared." *Id.* at 1268.

Under the standard applicable to the lease sale stage, we conclude that the Secretary's environmental impact statement for Lease Sale 922 [sic: 92] was adequate to meet the requirements of NEPA. As the district court observed, the Secretary provided "a reasoned analysis of the evidence before [him]." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985), in compliance with the statutory procedure. We need not consider whether the oil spill risk analysis was in fact flawed by a deficiency in methodology; we need only consider whether use of the particular methodology employed in preparing the oil risk spill analysis is reasonable. As we

previously stated, "NEPA does not require that we decide whether an [environmental impact statement] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements . . . as to methodology," *Kunzman*, 817 F.2d at 496. The Secretary may refine his analysis based on information learned during later stages of exploration.

Appellants also make a procedural challenge, claiming that the Secretary violated NEPA by failing to provide the public with adequate information on oil spill risks. The Secretary contends that the twelve-page discussion of methodology in the environmental impact statement, 1 FEIS IV-A-8 to IV-A-19, adequately fulfilled his responsibilities. We agree. NEPA does not require the environmental impact statement to disclose all assumptions underlying a particular methodology, *see, e.g.*, 40 C.F.R. § 1502.24 (1987) (requiring an environmental impact statement to "identify any methodologies used," but making the discussion of such methodology optional). In light of the speculative nature of the oil spill risk analysis at the lease sale stage, the omission of information regarding the Secretary's selection of the number and location of oil spill points, and the amount of oil assumed to have spilled from each point, is immaterial.[1]

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[1] The omission of speculative information from an environmental impact statement prepared at the lease sale stage is permissible; however, an environmental impact statement which is incomplete due to the omission of ascertainable facts, or the inclusion of erroneous information, violates the disclosure requirements of 42 U.S.C. § 4332(2)(C).

IV. The ESA Claims

[9] Section 7(a)(2) of the endangered Species Act, 16 U.S.C. § 1536(a)(2), requires federal agencies, with the assistance of the Secretary, to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species. . . ." The federal agency undertaking such an activity must consult the service having jurisdiction over the relevant endangered species;[2] the service then issues a biological opinion that details how the proposed action "affects the species or its critical habitat," including the impact of "incidental takings" of the species.[3] If a species might be endangered by the agency action, the service suggests "reasonable and prudent alternatives" to the agency's proposal. *Id.* at § 1536(b)(3)(A). The agency is not required to adopt the alternatives suggested in the biological opinion; however, "[i]f [the Secretary] deviates from them, he does so subject to the risk that he has not satisfied the standard of section 7(a)(2)." *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1160-61 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984).

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[2] The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), are jointly responsible for administering the ESA; the scope of their respective jurisdictions is set forth in 50 C.F.R. § 402.01(b) (1987).

[3] An incidental taking "refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. § 402.02 (1987).

Because ESA contains no internal standard or review, our review is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). We may set aside the actions of the Secretary or the NMFS only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Village of False Pass*, 733 F.2d at 610. The Secretary need not justify his decisions by clear and convincing evidence, as the appellants erroneously claim. We review the district court's application of this standard de novo. *Id.*

[10] Appellants contend that the Secretary failed to fulfill his responsibilities under section 7(a)(2) by rejecting one of the NMFS's "reasonable and prudent alternatives" for the protection of gray whales. In its biological opinion, the NMFS determined that a "major oilspill in the waters of the southeastern Bering Sea during peak migration periods of gray whales is likely to jeopardize the continued existence of the species." Nat'l Marine Fisheries Service, Nat'l Oceanic and Atmospheric Admin., U. S. Dep't of Commerce, *Endangered Species Act Section 7 Consultation – Biological Opinion* 13 (March 21, 1984) [hereinafter *Biological Opinion*], reprinted in 2 FEIS at H-4. to "reduce the risk of oilspills to gray whales," the NMFS recommended adoption of the Minerals Management Service's recommendation "of leasing deferrals within a 50-mile radius of Unimak Pass and the Pribilof Islands, and within 25 miles of shore along the Alaska Peninsula." *Biological Opinion* at 20, reprinted in 2 FEIS at H-6. the Secretary did not fully adopt this proposal. While he deleted "virtually all tracts within 50 miles of Unimak Pass," he did not provide the full 25 mile offshore buffer zone advised by NMFS. Instead, he deleted

all tracts within 11 miles of shore and adopted alternative measures he considered sufficient to prevent preliminary activities from endangering the whales. *See Statement of Reasons* 66-68, ER at 35; Minerals Management Service, U. S. Dep't of the Interior, *Sale 92, North Aleutian Basin, Secretarial Issue Document* (Aug. 1985) at 24-28 [hereinafter SID].

[11] The Secretary's departure from the suggestions in the biological opinion does not by itself constitute a violation of ESA; he satisfied section 7(a)(2) if he took alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species. We once again make this determination in light of OCSLA's multi-stage structure. As the D.C. Circuit noted in *North Slope Borough v. Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980), [m]andatory stage-by-stage review prevents the telescoping of any and every projected hazard to endangered life and to the environment into one overwhelming statutory obstacle. . . . By ensuring graduated compliance with environmental and endangered life standards, OCSLA makes ESA requirements more likely to be satisfied both in an ultimate and a proximate sense."

The Secretary's responsibilities are not identical at every step of the OCSLA process.

We must first determine, therefore, what actions ESA requires at the lease sale stage. We discussed this in depth in *Village of False Pass v. Clark*, where appellants raised an ESA challenge to the Secretary's proposed sale of oil leases in the St. George Basin of the Bering Sea, a refuge for rare gray and right whales. Because the NMFS had

phrased its "reasonable and prudent alternatives" in general, rather than specific terms, the Secretary did not explicitly reject the service's recommendations. Appellants nevertheless contended that the Secretary had violated ESA by failing "to adopt 'concrete measures' at the lease sale stage, such as tract deletion or seasonal drilling restrictions, to protect gray and right whales under ESA from oil spills and seismic testing," 733 F.2d at 608. We disagreed. As "[t]he lease sale decision itself could not directly place gray or right whales in jeopardy," we concluded that concrete steps were not necessary, and "the Secretary could properly limit his action at the lease sale stage to a plea for later implementation." *Id.* at 611. In *Village of False Pass*, the Secretary's plan included an agreement with NMFS for further monitoring after the lease sale and the inclusion of special disclaimers in the Final Notice of Sale specifying the Secretary's "continuing control of any post-sale drilling." *Id.* We ruled that such a plan was legally adequate, so long as the Secretary recognized his continuing obligations to implement the plan and to take other steps necessary to fulfill his ESA responsibilities at each stage of the OCSLA process. *Id.*; *see also Conner v. Burford*, 848 F.2d 1441, 1455-56 (9th Cir. 1988).

[12] Applying the standards established by *Village of False Pass* to appellants' ESA claims, we conclude that the steps taken by the Secretary to comply with ESA requirements were adequate, and his decision to reject some of NMFS's "reasonable and prudent alternatives" was neither arbitrary nor capricious. We agree with the district court that the Secretary's explanation for declining to delete 250 miles of offshore tracts was well reasoned and

supported by the record: The Secretary "pointed out that exploration-stage spills are most unlikely, that deletion of nearshore tracts would only marginally reduce the threat to endangered whales from such spills, and that seasonal or ad hoc drilling restrictions can provide adequate protection." *Tribal Village of Akutan v. Hodel*, No. A85-701 (consolidated with J85-37 & J85-38) (D. Alaska Mar. 11, 1988) (memorandum and order granting summary judgment to defendants on plaintiff's ESA and NEPA claims) at 3, ER at 17.

[13] Instead of deleting all the offshore tracts recommended by NMFS, the Secretary adopted other mitigating measures, including several that had been approved in *Village of False Pass v. Clark*. For example, he agreed to consult informally with NMFS following the lease sale and to initiate formal consultations once the development and production stages began. He modified the Final Notice of Sale to inform lessees that the Secretary might limit or suspend drilling activities whenever migrating whales were near enough to be subject to the risk of oil spills. Finally, he minimized disturbances to the whales by requiring operators and lessees to post whale lookouts when conducting seismic tests. *Statement of Reasons* at 67. The district court observed that "[t]hese steps and the SID explanation appear to have satisfied NMFS's parent agency, NOAA [National Oceanic and Atmosphere Administration] . . . for in its final ESA comments on the sale NOAA did not reiterate those recommendations." *Tribal Village of Akutan v. Hodel*, No. A85-701 at 2-3, ER at 17.

[14] We once again note that the risks to endangered species during the lease sale stage are virtually nonexistent. Only limited preliminary activities are permitted during this stage, such as geological, geophysical and other surveys "which do not result in any physical penetration of the seabed of greater than 500 feet and which do not result in any significant adverse impact on the natural resources of the Outer Continental Shelf [OCS]." Final Rule, Oil and Gas and Sulphur Operations in the Outer Continental Shelf, 53 Fed. Reg. 10596, 10704 (April 1, 1988). Geophysical contractors conducting these surveys are subject to regulation under the Marine Mammal Protection Act (MMPA), 16 USC §§ 1361-1407 (1982 & Supp. IV 1986), which flatly prohibits the taking of any marine mammal on the high seas except under circumstances not applicable here. 16 U.S.C. § 1372 (a)(1).[4]

Nor does the Secretary's rejection of some NMFS recommendations at the lease sale stage create a risk of oil spills at later stages. As with NEPA, the Secretary must comply with ESA at every step of the oil development process. Before the lessees can proceed to the exploration stage, the Secretary must "implicitly conclude that any approval does not affect an endangered species [and] take appropriate steps to insure, on the basis of his previous consultation with the [NMFS], the absence of jeopardy to an endangered species; or reinstate formal consultation." *Village of False Pass*, 733 F.2d at 611 (citation omitted). Lessees must pass through the same approval

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[4] Section 17 of ESA, 16 U.S.C. § 1543, states that unless otherwise provided, ESA shall be preempted by any more restrictive applicable provision of MMPA.

and review process prior to the production and development stage. While there may be "minor changes in the Secretary's discretion" at later stages in the OCSLA process, such changes are relatively insignificant. *Id.* at 615.

In light of the protective steps implemented at the lease sale stage, the improbability of an oil spill risk arising at this stage and the opportunity for the Secretary to take further action at later stages in the process, we conclude that the Secretary has fulfilled his responsibility to "insure that agency action . . . is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. § 1536(a)(2).

Appellants make the additional claim that NMFS's biological opinion violated section 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4), by failing to specify the impact of any incidental takings of endangered whales. The NMFS concluded that any incidental taking would be prohibited under pertinent provisions of the ESA and section 101(a)(3)(B) of the NMPA, 16 U.S.C. § 1371(a)(B), and therefore did not include a statement specifying the impact of incidental takings. *See Biological Opinion* at 26, 2 FEIS at H-7. The NMFS's interpretation of its obligation under section 7(b)(4) was correct. Furthermore, despite the omission of any formal statement about incidental taking, the biological opinion does consider the effect of such adverse impact on the whales. For example, in its discussion of right whales, the opinion states that "[b]ecause this species is nearly extinct, we believe that adverse impacts to small numbers . . . probably would have severe adverse effects on the entire population." *Id.* at 17, 2 FEIS at H-5. Therefore, we conclude that the

NMFS's omission of a formal statement concerning incidental takings of endangered species was not arbitrary or capricious, and did not violate the ESA.

V. Conclusion

The development of gas and oil reserves in an environmentally sound manner is a complex process: The Secretary must consider vast amounts of often speculative data and balance the demands of numerous interested parties in making plans that extent many years into the future. Under OCSLA's segmented approach, we must uphold the Secretary's actions so long as they meet the standards applicable to each stage. As the Supreme Court has noted, this approach was intended "to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production." *Secretary of the Interior v. California*, 464 U.S. 312, 341 (1984). Applying this analytical framework, we approve the Secretary's decision to go forward with Outer Continental Shelf Lease Sale 92, and affirm the district court's judgment.[5]

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[5] By separate order, we grant appellees' motion to stay the injunction pending remand to the district court.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

THE TRIBAL VILLAGE OF AKUTAN, ET AL.,
Plaintiffs,

v.

DONALD P. HODEL, ET AL.,
Defendants.

PARTIAL FINAL
JUDGMENT IN A CIVIL CASE

CASE NUMBER: A85-701 Civil
(Consolidated)

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT Counts 1 and 2 of the complaint of the State of Alaska plaintiffs in Case No. J85-37 Civil are dismissed with prejudice.

cc: Alaska Legal Service
Carl Bauman (HUGHES)
Patti Saunders
Deborah Vogt (AAG-K)
U.S. Attorney
William Rozell (FBDH)
Stephen Ellis (DELANEY)
Michael Frank (AAG-200)
O & J 3265

January 22, 1988
APPROVED:

/s/ James A. von der Heydt
United States District Judge

JoAnn Myres
Clerk

/s/ Pamela R. Richter
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

THE TRIBAL VILLAGE OF AKUTAN, ET AL., Plaintiffs, vs. DONALD P. HODEL, ET AL., Defendants. AMOCO PRODUCTION COMPANY, ET AL., Intervenor-Defendants.	MEMORANDUM AND ORDER

A85-701 Civil

THIS CAUSE comes before the court on the motions for summary judgment filed by the State of Alaska and by the federal and oil company defendants. This memorandum will address the State's challenge to Sale 92 under the Outer Continental Shelf Lands Act (OCSLA) only. Plaintiffs' other claims will be addressed in a separate order to be prepared in the near future.[1]

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[1] If the court should ultimately rule in defendants' favor, a procedural difficulty will arise. The circuit court retains jurisdiction over the preliminary injunction, and this court is powerless to vacate that injunction. although the circuit court may

(Continued on following page)

The focus of this ruling is the compliance of the Secretary of the Interior with OCSLA § 19, 43 U.S.C. § 1345, requiring consultation between the state and federal governments prior to a lease sale and a reasoned explanation for any rejection of the state's views. The court has found consultation adequate. The Secretary's explanation for rejecting Governor Sheffield's recommendations, while not perfect, was likewise adequate to withstand judicial review under the deferential standard set forth in the Act.

I. *EVIDENTIARY DISPUTES*

The court finds nothing improper in plaintiffs' submission of rebuttal evidence with their reply briefs. The court has considered this evidence in ruling on the instant motions.

Plaintiffs acknowledge that the Cook Inlet spill clippings represent a new line of argument rather than rebuttal material. Since this evidence was unavailable at the earlier stages of the briefing process, however, it was not inappropriate to introduce it with the reply briefs. Although the court will not strike the clippings, the court notes that plaintiffs acknowledge that the relevance of this material is slight. Joint Plaintiffs' Response to . . . Motion to Strike (Docket No. 165), at 13.

(Continued from previous page)

have intended to issue a remand order, *see* 816 F.2d at 685, it has never sent such an order to this court and has not responded to inquiries from these chambers. Defendants may wish to address an appropriate motion to the Ninth Circuit.

II. *OCSLA § 19*

A. *Secretary's Obligations and Standard of Review*

Section 19 requires the Secretary of the Interior to provide notice of a proposed lease sale. The governor of an affected state then has 60 days to submit recommendations regarding the sale's "size, timing, or location." Section 19 provides that "[t]he Secretary *shall accept* the recommendations of the governor" unless he "determines," after an "opportunity for consultation," that those recommendations "do not provide . . . for a reasonable balance between the national interest and the well-being of the citizens of the affected State" (emphasis added). The reasons for this determination must be explained in writing. The statute expressly requires that any judicial review of the determination be limited to the highly deferential "arbitrary and capricious" standard.

The State reads the statute as setting up a two-tiered structure of deferential review. While the court must defer to the Secretary in his determination, the Secretary must likewise defer to the governor. He must accept the governor's recommendation unless he can show it to be outside the range – presumably a broad one – of "reasonable" evaluations of the proper balance between state and national interests.

The court might well take this approach if it were writing on a clean slate. It is not. The Ninth Circuit requires no deference from the Secretary when the Secretary evaluates a governor's recommendation. In *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982), *rev'd in part on other grounds*, 464 U.S. 312 (1984), the State of California

advanced the two-tiered deference argument proposed here. Brief of the State of California, *California v. Watt*, Nos. 81-5699 *et al.* (Amoco SJ exhibit A), at 73. This argument found no echo in the circuit court's decision, which upheld the Secretary's § 19 determination simply because "the Secretary gave some consideration to the relevant factors," 683 F.2d at 1269. There was no evaluation of the range of reasonable balances or of whether the secretary, beyond merely explaining an alternative balance, had shown the governor's balance to be outside such a range.[2] It was enough that the Secretary touched on the relevant factors in setting forth his own, differing view of the state and national interests.

B. *Challenges to the Secretary's Reasoning*

1. *Failure to Consider Findings and Purposes of Act*

As part of his evaluation of the governor's recommendation, the Secretary must determine the national interest. Section 19(c) of OCSLA provides that this determination "be based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies of this subchapter." According to the State, the Secretary ignored the findings and

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[2] Presumably, a reviewing court using the two-tiered deference approach to the statute would require the Secretary to define, implicitly or explicitly, the boundary of a range of "reasonable" views of the national and state interests. The court would defer to the Secretary's definition of this range, but might reject as arbitrary and capricious a range so narrow as to suggest that anyone disagreeing with the Secretary to any degree was "unreasonable."

purposes set forth at 43 U.S.C. §§ 1801(13) and (14) and 1802(2) and (7). All of these relate to the need to develop oil and gas resources with due safeguards for the environment and for renewable resources such as fisheries.

This argument is meritless. Putting aside the fact that §§ 1801 and 1802 are not part of the "subchapter" referenced in the above quotation from § 19, the issues referenced by these findings and purposes are the theme of the Secretary's entire 30-page discussion of the national interest. It is irrelevant that the Secretary did not quote or cite the Congressional language.

2. *Failure to Weigh Potential Loss of Fisheries Jobs*

In weighing costs and benefits to determine the national interest, the Secretary included as a benefit of the sale the potential for job creation. Statement of Reasons (SR) at 11. In evaluating costs, he neglected to weigh the potential for destruction of jobs in the fishing industry. This inconsistency is not logical, and if it were material it could render the Secretary's overall determination arbitrary and capricious.

The error clearly is not material. As the Secretary has observed, it is extremely unlikely that a spill could occur prior to the production phase; hence job loss is a concern only if oil is found. If oil is found and a production phase occurs, about 750 long-term jobs would be created. In the event of a spill, a number of fishing industry workers might be idled (the SR, EA and FEIS make it clear that a given spill, even a large one, would probably affect only a portion of the fishery). Before this number can be balanced against the figure of 750 new jobs, however, it must

be discounted (1) by the strong likelihood that no major spill will occur and spread in a manner capable of seriously affecting fisheries, and (2) by the strong likelihood that any loss of jobs would be largely temporary. After carefully reviewing the SR, EA, and FEIS, the court is confident that the discounted job-loss figure would be at least an order of magnitude lower than the job-creation figure.

3. *Use of Net Economic Value as an Absolute Value*

The Secretary calculated a range of discounted Net Economic Values (NEVs) for the sale. He used the most conservative NEV in his § 19 determination to represent the economic benefit of proceeding with the sale as planned.

According to the State and amici, Interior has acknowledged that an NEV is only useful for purposes of comparing relative values of sale proposals, and should not be used as an absolute value to justify a particular sale. This is not accurate. The department has merely acknowledged that NEV calculations are speculative and are *more* useful as relative values than as absolute values. Given that potential economic gain is an important factor in determining the national interest, it was not arbitrary and capricious for the Secretary to use an NEV calculation (indeed, a relatively conservative one) to estimate the magnitude of that gain. Indeed, the State itself has relied on its own NEV calculation in arguing against the sale. It is difficult to conceive of an alternative to reliance on such a calculation, under one label or another, in weighing the costs and benefits of a lease sale.

4. *Refusal to Delete Near-Shore Tracts*

The governor requested deletion of the 14 percent of the sale area nearest the shore. The Secretary declined to do so.

On page 38 of the SR, The Secretary alludes to the fact that he had previously deleted a large area of Bristol Bay from consideration. Contrary to the State's assertion, the SR does not claim this deletion was a response to the governor's request. The State is correct, however, in observing that the prior deletion was, in fact, not a part of the § 19 process. It is therefore puzzling that the State has gone on to attack the prior deletion as an improper way of responding to a governor's recommendation for deletion. The State's analysis is irrelevant.[3]

The State also attacks the Secretary's reasoning in rejecting the governor's nearshore tract recommendation. The Secretary observed that deferral of these tracts would halve the NEV of the sale. Although there would be some additional protection of the environment, overall environmental risk was similar and was "small under either option." For the offshore loading scenario, the probability

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[3] The analysis is also flawed. The State reads *Massachusetts v. Clark*, 594 F. Supp. 1373 (D. Mass. 1984), as holding that the only rational way to delete tracts from a sale in response to environmental concerns is to begin by deleting tracts with high industry interest. The case should not be read so broadly. It merely observes that such deletions should reflect the potential for environmental harm; on Georges Bank, this meant deletion of high-interest tracts. In Bristol Bay, it may be that a medium-interest tract located in a concentration of fish or wildlife resources would present a greater threat than a high-interest tract located in a less sensitive portion of the bay.

of a spill occurring and contacting land within 10 days was 7% under the Secretary's proposal and 6% under the governor's. The lost NEV was "too much for the nation to give up for a slight reduction in risk to the environment."

According to the State, the Secretary used inconsistent assumptions in arriving at these probabilities. The mathematical issues are complex, and the parties' experts disagree as to whether the calculations are flawed. It is undisputed, however, that if the State's expert is correct the 7% figure would change to 8% and the 6% figure would change to 4%.[4] Neither change is statistically significant. Under NEPA, where a more rigorous standard of review is used, errors in the data base underlying a decision are not viewed as material if they are not statistically significant. *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1147 (D. Alaska 1983). More importantly, it simply is not credible that the Secretary's balance – which he apparently viewed as heavily weighted against deletion – would have changed because of this alteration in the probability figures. All of the Secretary's characterizations of the relative risks would remain valid. Both risks remain "small." The two single-digit figures remain "quite similar." The benefit of deleting nearshore blocks remains "small." In conclusion, even if the Secretary's figures were erroneous, his mistake did not render his overall decision arbitrary and capricious.

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[4] In other words, the Secretary believed the probabilities that no spill of the type described would occur were 94 and 93 percent for the full-sale and nearshore-deferral alternatives, respectively, whereas the State puts these probabilities at 92 and 96 percent.

5. *Refusal to Delay Sale Until 1994*

The governor suggested an 8-year delay in the sale to permit development of improved environmental data, to allow new cleanup technology to come on line, and to profit from additional years of experience from other drilling operations in the Bering Sea. In quite a thoughtful analysis, the Secretary showed that each of these benefits was not as important as the governor maintained. For example, he pointed out that while experience in the Bering Sea is limited, experience in similar environments such as the North Sea is extensive. He then concluded that the economic costs of delay outweighed the marginal environmental benefit

The State maintains that there is no cost of delay. By juggling certain figures, the State can convert the Secretary's $218 million NEV for the immediate sale into a negative number. Of course, in doing so the State alters none of the conservative assumptions underlying that NEV figure.

Even if the State's criticisms of figures underlying the NEV were all persuasive – and they are not – the State could not establish that the Secretary acted arbitrarily simply by showing that the most conservative of a range of NEV calculations would be sightly [sic: slightly] negative. The bulk of the NEV range would remain positive, and there would still be a probability of substantial loss in the event of delay.

6. *Failure to Allude to Certain Department of Energy Information*

In weighing the nation's need for domestic oil production, the Secretary was not arbitrary and capricious in relying in part on Congressional findings.

7. *Assumption that Delay in Sale Would Cause Delay in Production*

It was not arbitrary and capricious for the Secretary to assume that a substantial delay in the sale of leases would translate into a substantial delay of production.

8. *Other Challenges*

The State's other challenges to the Secretary's reasoning are meritless.

C. *Alleged Failure to Consult*

Section 19 requires the Secretary to provide "the opportunity for consultation." The State argues that the governor was deprived of a meaningful opportunity to comment on the NEV because he did not receive information necessary to evaluate assumptions used in the economic model until the day before the sale announcement.

OCSLA does not guarantee a right to comment on such information. It merely obliges the Secretary to disclose the "size, timing, and location of a proposed lease sale" sufficiently in advance to allow for a 60-day comment period. While the State may offer economic analysis, it has no legal entitlement to the Secretary's analysis or other reasoning behind the sale until the Secretary's

explanation of his reasons for accepting or rejecting the governor's recommendation, at the conclusion of the § 19 process. *California v. Watt*, 520 F. Supp. 1359 1385 (C.D. Cal. 1981), *aff'd in relevant part*, 683 F.2d 1253 (9th Cir. 1982), *rev'd in part on other grounds*, 464 U.S. 312 (1984).[5] Hence the Secretary actually went beyond mere compliance with the statutory obligation for "consultation."

III. *PARTIAL FINAL JUDGMENT*

The court finds that there is no just reason for delay of entry of partial final judgment under Rule 54(b). The court further notes that in reviewing this order, the appellate court will be required to address a few factual issues "similar to those contained in the claims still pending before the trial court." *Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985), quoting *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). This result is justified by the following facts. First, delay in resolution of this action seems to entail substantial costs to certain defendants. It is important to commence the appeal process as early as possible. Second, this court's final judgment on all issues can be expected in a few weeks. In the unlikely event that the Court of

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[5] A corollary of this principle is that in challenging a statement of reasons a governor may address certain issues not raised in the governor's prior comments, provided those issues first arose in connection with the Secretary's rebuttal of the governor's recommendation. *Village of False Pass, supra*, 565 F. Supp. at 1138-39, is not to the contrary. the "claims" the governor had not raised in that case related to deficiencies in the Secretarial Issue Document, not the Statement of Reasons.

Appeals has ruled in the meantime, the overlapping factual issues will be fresh in the minds of the judges of the panel hearing the case, and consideration of the second appeal will involve little wasted effort.

Accordingly, IT IS ORDERED:

(1) THAT plaintiffs' motion to file rebuttal affidavits (Docket No. 155) is granted;

(2) THAT the motion of Amoco Production Company, *et al.* to strike certain materials (Docket No. 162) is denied;

(3) THAT the motion of plaintiff State of Alaska for summary judgment (Docket No. 138) is denied insofar as it seeks relief under the Outer Continental Shelf Lands Act;

(4) THAT the motions of federal defendants and of Amoco Production Company, *et al.* for summary judgment (Docket Nos. 131 and 133) are granted with respect to plaintiffs' claims under the Outer Continental Shelf Lands Act;

(5) THAT Counts 1 and 2 of the complaint of the State of Alaska plaintiffs in Case No. J85-37 Civil are dismissed with prejudice;

(6) THAT, pursuant to the findings set forth in Part III of this memorandum and order, partial final judgment be entered restating item (5) above.

DATED at Anchorage, Alaska, this 22nd day of January, 1988.

/s/ James A. von der Heydt
United States District Judge

cc: Alaska Legal Service
Carl Bauman (HUGHES)
Patti Saunders
Deborah Vogt (AAG-K)
U.S. Attorney
William Rozell (FBDH)
Stephen Ellis (DELANEY)

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

THE TRIBAL VILLAGE OF AKUTAN, ET AL.,
Plaintiffs,

v.

DONALD P. HODEL, ET AL.,
Defendants.

PARTIAL FINAL
JUDGMENT IN A CIVIL CASE

CASE NUMBER: A85-701 Civil
(Consolidated)

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) THAT plaintiffs' complaints in *Shefield v. Hodel,* (J85-37 Civil) and *Trustees for Alaska v. Hodel* (J85-38 Civil) are dismissed in their entirety;

(2) THAT the Second and Third Causes of Action of the First Amended Complaint of the villages of Akutan, Togiak, and Nelson Lagoon in *Village of Akutan v. Hodel* (A85-701 Civil) are dismissed;

(3) THAT this court's Order and Preliminary Injunction and its Order Granting Partial Stay of Preliminary Injunction, both dated January 13, 1986, are hereby vacated, except there shall remain in effect until the Secretary opens the Sale No. 92 bids:

(A) Paragraph 2 of this Court's January 13, 1986 Order Granting Partial Stay to the extent that it tolled the effectiveness of 30 C.F.R. § 256.47(a) and the notice published at 50 Fed. Reg. 51,372 (December 16, 1985); and (8) Paragraph 3 of that Order.

March 11, 1988
Date

JoAnn Myres
Clerk

APPROVED:

/s/ James A. von der Heydt
United States
District Judge

_____
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TRIBAL VILLAGE OF AKUTAN, ET AL., Plaintiffs, vs. DONALD HODEL, ET AL., Defendants, AMOCO PRODUCTION CO., ET AL., Intervenor-Defendants.	*MEMORANDUM AND ORDER*

A85-701 Civil (Consolidated with J85-37 Civil and J85-38 Civil)

THIS CAUSE comes before the court on the parties cross-motions for summary judgment. This order

addresses all remaining issues in the three consolidated cases except the village plaintiffs' aboriginal title claim (that claim has been stayed pending the outcome of further proceedings in *Amoco Production Co. v. Village of Gambell*, U.S. Sup. Ct. No. 85-1239).

This memorandum and order must be read in conjunction with the parties' briefs. It does not restate plaintiffs' claims nor comprehensively review the facts. In general, the court's analysis is set forth only where the court has departed in some measure from defendants' reasoning.

A. *Endangered Species Act*

1. *Failure to Adopt NMFS Alternatives*

In the early planning stages of Sale 92, the National Marine Fisheries Service recommended pursuant to the Endangered Species Act (1) that certain near-shore tracts be deleted from the sale to protect a seasonal migration route of gray whales, and (2) that lessees be required to suspend drilling when right whales were nearby. Notably, the Biological Opinion containing these recommendations was addressed solely to the leasing and exploration stages of Sale 92.[1] The recommendations sought to mitigate exploration stage oil spill risks to right and gray whales.

The Secretary responded to these recommendations in detail at pages 24-28 of the Secretarial Issue Document (a passage ignored by all parties in their analysis of ESA

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[1] A Biological Opinion on development and production stage issues was not required at this juncture. *See, e.g., Connor v. Burford*, 836 F.2d 1521, 1537 (9th Cir. 1988).

issues).[2] He did not adopt either recommendation entirely, but took a number of steps to protect endangered whales. These steps and the SID explanation appear to have satisfied NMFS's parent agency, NOAA, with respect to the two recommendations at issue, for in its final ESA comments on the sale NOAA did not reiterate those recommendations.

While judicial decisions and ESA's legislative history indicate that the Secretary rejects NMFS recommendations "at his peril," *e.g.*, *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1162 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984), it is not clear that this characterization applies where the recommendations have been dropped after further consultation. In any event, such a decision is reviewable only for failure to provide a reasoned explanation considering the relevant factors or for clear error of judgment. *North Slope Borough v. Watt*, 20 E.R.C. 1457, 1462 (D. Alaska 1984). The decision, as explained in the SID, easily passes this test. Briefly, the Secretary pointed out that exploration-stage spills are most unlikely, that deletion of nearshore tracts would only marginally reduce the threat to endangered whales from such spills, and that seasonal or ad hoc drilling restrictions can

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[2] Plaintiffs' briefing reflects fundamental confusion as to what portion of the SID relates to the NMFS recommendations at issue. *E.g.* Pl. P.I. Memo at 73 (citing SID p. 46). Plaintiffs' briefing is likewise confused with respect to the distinction between exploration stage spill risk, at issue here, and development/production stage spill risk. Pl. P/I/ Memo at 70.

provide adequate protection.[3] There is substantial support in the record for these observations.

2. *Failure to Use Best Available Data*

Plaintiffs appear to contend that Interior must undertake and complete any study that has "relevance" to possible future effects on endangered species. Pl. P.I. Memo at 81. This is not the test. *See False Pass, supra,* 565 F. Supp. at 1154-55. Plaintiffs have not carried their burden of showing that it is *necessary* that all further action await these studies to prevent a violation of ESA, taking into consideration the precautionary measures that have been or may be adopted. Defendants are therefore entitled to summary judgment on this issue. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

3. *"Takings" of Endangered Whales*[4]

Plaintiffs' assertion that the mere possibility that an endangered whale might accidentally be killed renders the entire sale illegal under ESA § 9 relies on a view of Congressional intent that is not credible. *See California v. Watt,* 520 F. Supp. 1359, 1387 (C.D. Cal. 1981).

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[3] Note that there will be a further opportunity to impose such restrictions before an exploratory drilling takes place: when permits are issued under 30 C.F.R. § 250.34-1.

[4] Jurisdiction over this aspect of plaintiffs' ESA claim may be questionable. *See Hallstrom v. Tillamook County,* 831 F.2d 889 (9th Cir. 1987). Briefing has not been adequate to evaluate this issue.

Plaintiffs' argument that the NMFS Biological Opinion should have contained an incidental taking statement presupposes that incidental takings are reasonably likely to occur. In making this supposition, plaintiffs rely on statements in the FEIS relating to the development and production stage. But the Biological Opinion related only to the leasing and exploration stages. Incidental takings are very unlikely during those stages.[5] Hence, even if the court were to accept plaintiffs' analysis of ESA § 7(8), no incidental taking statement would be required or useful in the pre-lease Biological Opinion.

4. *Effect of Flawed OSRA on ESA Determination*

As the court explained in its January 22 order (at 8-9), any defects in the Oil Spill Risk Analysis were not material.

B. *National Environmental Policy Act*

1. *Data Gaps*

Plaintiffs have identified 14 "data gaps" in the information underlying the Sale 92 decision. They contend that each of these gaps must be filled by further study before the sale and exploration stages can proceed.

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[5] Even a low probability of destruction of a species is a matter of concern. Section 7(a)(2) of ESA therefore is triggered when there is a likelihood merely of jeopardy to the species. No parallel language mandates an incidental taking statement when there is a likelihood only of jeopardy to individuals, as opposed to a likelihood of actual takings.

The court believes this argument is adequately addressed in defendants' briefing. *See also* 11/27/85 Decision Memo (State Ex. 11B), attachment B. With respect to the black brant studies emphasized by plaintiffs, in particular, the court notes that no threat can develop until exploratory drilling begins, and such drilling requires a permit and an environmental assessment. It is conceded, moreover, that threats to black brant can arise only in spring and fall, when the birds are present in Izenbek Lagoon; exploratory drilling may be proposed at time when it could pose no threat at all. And given the delay caused by this litigation, it is now likely that the requested black brant study will be completed before Interior is asked to approve an exploration plan. Hence, the exploration plan EA is an appropriate time to further analyze threats to black brant and to evaluate further the adequacy of data for a decision.

2. *Worst Case Analysis*

To the extent that plaintiffs maintain that Interior did not have the option of preparing worst case analyses to compensate for data gaps, regarding gray and right whales, Pl. P.I. Memo at 39, their interpretation of the law appears to conflict with *Oregon Natural Resources Council v. Marsh*, 832 F.2d 1489, 1496-97 (9th Cir. 1987). That case holds that "[i]f information is lacking that is essential to a reasoned choice and the cost of obtaining it is *not* exorbitant, the agency must obtain the information and include it in the statement *or* include a worst case analysis." *Id.* (emphasis added). Moreover, the only information on whale impacts that can be deemed "essential" at this stage is information relating to effects in the pre-drilling

portion of the exploration phase, *i.e.*, information on the impact of seismic testing. *False Pass*, 565 F. Supp. at 1152-53. These effects and the adequacy and availability of information on these effects were evaluated in the recent supplemental EIS for Lease Sale 70, later adjudicated to be adequate. *See False Pass*, 733 F.2d at 612. The Sale 70 supplement has been incorporated by reference into the discussion of seismic impacts in the Sale 92 EIS. FEIS IV-J-4, IV-J-6 to 7.

The main focus of plaintiff's attack on the worst case analyses is the portion of those analyses devoted to a hypothetical catastrophic spill. Plaintiffs contend that the hypothetical does not truly represent the worst possible spill. Even if plaintiffs are correct, however, their criticism cannot invalidate the Sale 92 EIS. In *False Pass* the worst case spill would have been 100,000 barrels, but the EIS evaluated only a 10,000-barrel spill. This defect was not fatal to the EIS, however, because a true worst-case analysis could be conducted later and still precede any drilling. 733 F.2d at 614-16. Even accepting plaintiffs' criticisms, the Sale 92 worst-case scenario comes closer to simulating the worst possible spill then did the 10,000-barrel scenario in the Sale 70 EIS.

Plaintiffs argue that a seismic-impacts worst case analysis is necessary for all species, rather than for right and gray whales only. This contention fails because the Secretary reasonably concluded that data was adequate for other species. SR 18-20, 53-54; SIN 21-22; FEIS IV-8-17 to 18; 11/27/85 Decision Memo, att. 8, 1-2.

3. *Adequacy of Oil Spill Risk Analysis*

Plaintiffs' argument that defects in the OSRA render the FEIS inadequate are sufficiently refuted in federal defendants' briefs of January 6, 1986 and July 13, 1987 and in the portions of the administrative record cited therein. Notably, "NEPA does not require that we decide whether the [EIS] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). Rather, courts must ensure that an agency has provided "a reasoned analysis of the evidence before it." *Id.* Clearly, Interior has done so here. It should be added that the most strongly-pressed objection to the OSRA was shown in the January 22 ruling to fall below the threshold of materiality. Moreover, it will be possible to refine the OSRA once exploratory data shows the location of oil, if any.

4. *Opportunity for Public Comment/Failure to Respond to Comment*

Plaintiffs' only substantial argument with respect to the public participation process is the argument added in their June 22, 1987 brief. Plaintiffs observe that the methodology for selecting OSRA launch points and for allocating oil quantities to the various points was poorly explained in the EIS. Because this methodology is fundamental to an understanding of the spill model, the failure to explain it made it difficult for outsiders to comment on an important aspect of this key element of the EIS.

The court is inclined to agree with plaintiffs that the explanation of the OSRA failed to meet NEPA standards.[6] This lawsuit has provided a detailed airing of the unexplained methodology, however. It has become clear that correction of any errors in the methodology at issue – errors that public comment might have identified at the DEIS stage – could not have brought about a material change in the outcome of the OSRA.[7] The defect therefore fails in the class of "inconsequential" deficiencies tolerated in such cases as *Oregon Environmental Council v. Kunzman [Kunzman IV]*, 817 F.2d 484, 492, 495-96 & n.6 (9th Cir. 1987) and *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 673 F. Supp. 1019, 1023 (D. Or. 1987).

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[6] While it is troubling that plaintiffs did not complain of the lack of explanation when they commented on the DEIS, their failure to do so does not appear to give rise to any legally cognizable defense to their claim.

[7] The court would be unable to make a finding of this kind were the unexplained process a nontechnical one. Here, the missing explanation relates to a statistical analysis, and absolute, mathematical truth is accessible to the court.

It is also essential to bear in mind that the absence of explanation did not, in itself, detract from "disclosure of environmental impacts"; hence this case must not be confused with such cases as *Oregon Environmental Council v. Kunzman [Kunzman II]*, 614 F. Supp. 657, 665 (D. Oregon 1985). It merely affected the correction of errors in an essentially mathematical process. Only if those errors were in fact significant would the more fundamental "disclosure of environmental impacts" be rendered inadequate. *Cf. Oregon Environmental Council v. Kunzman [Kunzman IV]*, 817 F.2d 484, 495-96 & n.6 (9th Cir. 1987).

5. *Failure to Consider Separately a Nine-Year Delay Alternative and to Reconfigure Alternative IV as Suggested by EPA*

Interior considered a reasonable range of alternatives. It provided a reasonable explanation for declining to consider a nine-year delay (in addition to a five-year delay) and in declining to redesign EIS Alternative IV in the manner suggested by EPA.

Accordingly, IT IS ORDERED:

(1) THAT defendants' and intervenors' motions for summary judgment (Docket Nos. 128, 131, 133) are granted;

(2) THAT plaintiffs' motions for summary judgment (Docket Nos. 129, 138) are denied;

(3) THAT plaintiffs' complaints in *Sheffield v. Hodel* (J85-37 Civil), and *Trustees for Alaska v. Hodel* (J85-38 Civil) are dismissed in their entirety;

(4) THAT the Second and Third Causes of Action of the First Amended Complaint of the villages of Akutan, Togiak, and Nelson Lagoon in *Village of Akutan v. Hodel* (A85-701 Civil) are dismissed;

(5) THAT this court's Order and Preliminary Injunction and its Order Granting Partial Stay of Preliminary Injunction, both dated January 13, 1986, are hereby vacated, except there shall remain in effect until the Secretary opens the Sale No. 92 bids:

(A) Paragraph 2 of this Court's January 13, 1986 Order Granting Partial Stay to the extent that it tolled the effectiveness of 30 C.F.R. § 256.47(a) and the notice published at 50 Fed. Reg. 51,372 (December 16, 1985); and

(B) Paragraph 3 of that Order.

(6) THAT, the court having found that there is no just reason for delay and that legal and factual issues on appeal will be dissimilar from those contained in the claim still pending before this court, the Clerk shall prepare a form of partial final judgment restating items (3) through (5) above.

DATED at Anchorage, Alaska, this 11th day of March, 1988.

/s/ James A. von der Heydt
United States District Judge

cc: Carol Daniel (AK LEGAL)
Carl Bauman (HUGHES)
Patti Saunders
Bruce Landon (AUSA)
William Rozell (FBDH)
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